

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In the matter of an application under Article 121 of the Constitution in respect of the Bill titled “**Human Rights Organization (Incorporation) Act**”.

**S.C.S.D.No. 33/2021** Petitioners

1. Kulathunga Mudiyanseelage Wasantha  
Bandara,  
No. 278/31, Colombo Road,  
Kurunegala.

2. W.D. Raja Dharmasirie Goonerathne,  
No. 150/05, High Level Road,  
Maharagama.

3. Ballantudawa Achchige Nuwan  
Chamara Indunil,  
No. 415/34, Off High Level Road,  
Gangodawila.

Counsel

Chamara Nanayakkarawasam with Dinesh  
De Silva and Dimuthu Fernando.

Vs.

Respondent

Hon. Attorney General  
Attorney General's Dept.  
Colombo 12.

Counsel

Ms. Kanishka De Silva Balapatabendi ,  
SSC, with Ms. Indumini Randeny, SC.

Before

Jayantha Jayasuriya, PC. CJ.  
Mahinda Samayawardhena, J.  
Arjuna Obeyesekere, J.

The Court assembled for the hearing at 10.00 a.m. on 12<sup>th</sup> August 2021.

A Bill in its long title referred to as “An Act to incorporate the Human Rights Organization” has been presented to Parliament as a Private Member’s Bill. The short title of the Bill reads as “Human Rights Organization (Incorporation) Act”.

The Bill was published in the Government Gazette dated 20<sup>th</sup> July 2021 and was placed on the Order Paper of the Parliament on 03<sup>rd</sup> August 2021.

The Petitioners invoked the jurisdiction of this Court in terms of Article 121 of the Constitution on 09<sup>th</sup> August 2021 and moved this Court to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. Upon receipt of the petition, the Attorney-General was noticed in terms of Article 134(1) of the Constitution.

Initially this matter was listed for hearing on 11<sup>th</sup> August 2021 and was rescheduled for 12<sup>th</sup> August 2021. Court heard submissions of learned Counsel for the Petitioners and the learned Senior State Counsel on behalf of the Attorney General.

The learned Counsel for the Petitioners presented two principal arguments before this Court.

The first was that the Bill has not been presented before Parliament in accordance with the provisions of the Standing Orders of Parliament in that the opinion of the Attorney General has not been obtained and the Bill is therefore in violation of the provisions of Article 78(2) of the Constitution which specifies *inter alia* that the passing of a Bill by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament.

The learned Counsel for the Petitioners submitted that the Supreme Court in exercising its jurisdiction under Article 120 of the Constitution has the jurisdiction to examine as to whether the Bill under consideration has been placed on the Order Paper of Parliament in accordance with the Standing Orders of Parliament. This submission was on the basis that this Court in the "**Divineguma Bill**" S.C.S.D. No. 04-14/2012 had held "*that the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and its procedural compliance, before such Bill is placed on the Order Paper of Parliament.*"

The learned Counsel for the Petitioners accordingly submitted that the Supreme Court has the jurisdiction to inquire into whether there is due compliance with the provisions of Standing Orders 52(3) and 52(4) of the Parliament and that any failure to comply with such Standing Orders should result in Court determining that the Bill is inconsistent with Article 78 of the Constitution.

The learned Senior State Counsel however did not concur with the above submission of the learned Counsel for the Petitioners and submitted that the jurisdiction conferred on this Court does not extend to considering compliance with Parliamentary procedure. The learned Senior State Counsel, while referring to the determination of this Court in the "**Twenty First Amendment to the Constitution Bill**" [ (2013) Decisions of the Supreme Court on Parliamentary Bills, Vol. XI 90 at 94] where it was held that "*the placement of the Bill on the Order Paper is part of the proceedings of Parliament that took place on 18<sup>th</sup> June 2013 and this Court is denuded of jurisdiction to impeach proceedings in Parliament*" submitted that placing of a Bill on the Order Paper of Parliament is a step in the legislative process that is purely within the purview of Parliament as it is part of the proceedings of Parliament and therefore this Court is devoid of jurisdiction to make any determination on the same. Hence it was submitted that Article 78 of the Constitution should be interpreted accordingly.

The learned Counsel for the Petitioners had however submitted in the written submissions tendered to this Court on behalf of the Petitioners that he is not pursuing with this argument. Hence, the necessity for this Court to make a determination in this regard does not arise.

The second principal argument of the learned Counsel for the Petitioners was that the Bill, in its present form and in particular the provisions of Clause 7 alienates the executive power of the People, and thereby infringes upon the Sovereignty of the People. He therefore submitted that the provisions of the Bill are in violation of Articles 3 and 4 of the Constitution.

We will now proceed to examine the clauses of the Bill individually as well as cumulatively to determine the constitutionality of the Bill.

There are fifteen Clauses in the Bill. They are as follows:

- Clause 1 – Short title
- Clause 2- Incorporation of the Human Rights Organization
- Clause 3- General objects of the Corporation
- Clause 4- Management of the Corporation
- Clause 5- General Powers of the Corporation
- Clause 6- Rules of the Corporation
- Clause 7- Right to engage in dialog[ue] with concern[ed] parties with a view to solve dispute[s]
- Clause 8- Fund of the Corporation
- Clause 9- Corporation may hold property movable and immovable
- Clause 10- Limitation of liability of members
- Clause 11- Property remaining on dissolution
- Clause 12- Accounts and Audit of the Corporation
- Clause 13- Seal of the Corporation
- Clause 14- Saving of the rights of the Republic and others
- Clause 15- Sinhala text to prevail in case of an inconsistency

The General objects of the Corporation as set out in Clause 3 reads as follows:

*“The general objects for which the Corporation is constituted are hereby declared to be:—*

- (a) to protect and make known human rights, humanities and fundamental rights;*
- (b) to promote and encourage humanities, sports and social services;*
- (c) to facilitate in providing various relief facilities to those affected by the natural disasters and manmade disasters;*

- (d) *to conduct seminars, dialog[ue] and various programmes of religious, social and cultural importance locally and internationally;*
- (e) *to organise leadership programmes;*
- (f) *to lead a committee of patrons comprising of religious leaders representing all communities;*
- (g) *to establish and conduct libraries, to assist in printing and publishing of books, magazines, souvenirs, journals, cassettes, compact Disks and software and to provide other services necessary to the attainment of the objectives of the Corporation;*
- (h) *to do acts in collaboration with institutions or organizations local or foreign, having similar objects to those of the Corporation; and*
- (i) *to do all such other acts and things as are necessary for and incidental or conducive to the attainment of the above objects.”*

#### Clause 7

The learned Counsel for the Petitioners, in support of his submission that the Bill, in its present form, alienates the executive power of the People, and thereby infringes upon the Sovereignty of the People and violates the provisions of Articles 3 and 4 of the Constitution, drew the attention of this Court to the provisions of Clause 7 of the Bill, which reads as follows:

*“The Executive Chairman and the Chairman, Co-ordinator or appointed Member shall have the authority in the Government and Non Government institute to—*

- (a) *engage in negotiation with the concerned parties in order to solve their dispute whatsoever, with good intention of solving such disputes in the Government organisations for the benefit of the people;*
- (b) *engage in dialog[ue] with concern[ed] authorities in any Police Station within any administrative District in Sri Lanka, for the welfare of the people, in order to solve the dispute where an injustice has taken place; and*

- (c) *act with the corporation of Honourable Members and Minister of Parliament of the Democratic Socialist Republic of Sri Lanka, the Provincial Council Members, the Pradeshiya Sabha Members and the Government and Non Government Organization upon any complain[t] or request made [to] any members in the society for their benefit in a manner stated in paragraph (a) above."*

It was submitted further by the learned Counsel for the Petitioners that the provisions of Clause 7, while alienating the executive power of the people to a private organization, seeks to repose powers on certain officers of the Corporation without stipulating any guidelines or a mechanism to supervise and/or control the exercise of such powers. It was submitted that granting of such broad and vague powers without any guidelines or controls would lead to an arbitrary exercise of power and thereby would be in violation of Article 12(1) of the Constitution.

The learned Senior State Counsel, while fully concurring with the abovementioned submissions of the learned Counsel for the Petitioners, submitted further that the provisions of the Bill seek to alienate and interfere with not only the executive power of the People but both the legislative power and the judicial power, too. Therefore, it was submitted that the Bill is required not only to be passed by the special majority required under the provisions of paragraph (2) of Article 84 but also requires to be approved by the People at a Referendum as provided for by the provisions of Article 83 of the Constitution.

Article 3 of the Constitution provides *inter alia* that in the Republic, Sovereignty is in the People and is inalienable. In terms of Article 4, the Sovereignty of the People shall be exercised and enjoyed in the manner stipulated therein, and includes the following:

- (a) The legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
- (b) The executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
- (c) The judicial power of the People shall be exercised by Parliament through Courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

Referring to Articles 3 and 4, the Supreme Court in “*Nineteenth Amendment to the Constitution Bill*” S.C.S.D. Nos. 11, 13, 15-21, 25-28, 30-35, 37-40/2002 stated as follows:

*“The powers of Government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Article 4(a), (b) and (c) which specifies that each organ of Government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and Judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power “of the people” shall be exercised by Parliament; the executive power “of the People” shall be exercised by President and the judicial power “of the People” shall be exercised by Parliament through Court. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and is exercised by the particular organ of government being its custodian for the time being, is for the People.*

*Therefore the statement in Article 3 that sovereignty is in the People and is “inalienable”, being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:*

- (a) The legislative power of the People is inalienable and shall be exercised by Parliament;*
- (b) The executive power of the People is inalienable and shall be exercised by the President; and*
- (c) The judicial power of the People is inalienable and shall be exercised by Parliament through Courts.”*

The Public Service forms part of the executive branch of the Government and public officers in discharging their duties exercise the executive powers of the People. They exercise such powers subject to judicial supervision as well as subject to the scheme of supervision provided under the Constitution and written law. The statutory rights sought to be reposed on “The Executive Chairman, Co-ordinator or appointed Member” by Clause 7 include the power to engage in

negotiations with ‘*concerned parties*’ in the ‘*Government organisations*’ and engage in dialogue in order to solve a dispute where an injustice has taken place.

This Clause raises several concerns. First, the statutory power of “negotiation” is vague and ambiguous, and as such would be violative of Article 12(1) of the Constitution.

Second, it would appear, in any event that the statutory power to negotiate with a public officer exceeds an opportunity to make representations to a public officer. It would appear then that the power of negotiation would exceed even the right given to Attorneys-at-Law to make representations on behalf of their clients. It should be noted that the special privilege granted to Attorneys-at-Law to make such representations is based upon the premise that they have been given leave to do so by the Supreme Court, belong to a responsible professional association, and that they are subject to oversight by the Supreme Court. Conferring power on an institution that has neither expertise nor safeguards would not only be arbitrary but also dangerous, and violative of Article 12(1) of the Constitution.

Thirdly, even Attorneys-at-Law do not have the right to make representations on behalf of their clients in all fora. The conferring of an unbridled power to negotiate as contemplated by the Bill, raises the question of interference with the discharge of a public officer’s functions. Such interference by a person who is not subject to any control or whose conduct is not subject to any review and the power to enter into negotiation, which can influence the decision of the public officer, in an environment where the public officer is obliged to enter into such negotiation, infringes on and interferes with the exercise of the Executive power of the People by the public officer. This infringement and interference with the exercise of the Executive power of the People would therefore violate Article 3 read with Article 4(b) of the Constitution.

Furthermore, it is pertinent to note that while Clause 7 makes reference to ‘*Government and Non Government institute*’, Clause 7(a) proceeds to refer to ‘*Government organisations*’. These terms have not been defined and are vague and ambiguous, and as such would again fall foul of Article 12(1) of the Constitution.

Clause 7(a) also enables negotiation with ‘*concerned parties*’ in ‘*Government organisations*’. In terms of Article 3 of the Constitution read with Article 4 of the Constitution, the powers of government include the legislative power of the People, the executive power of the People and the judicial power of the People. The Supreme Court in *Nineteenth Amendment to the Constitution Bill*’ [Supra], recognised the legislature, executive and judiciary as the three organs

of government. Therefore, Clause 7 of the Bill infringes on legislative as well as the judicial power of the people.

The power vested by Clause 7(b) empowers the named officers of the Corporation to make a determination that an ‘*injustice*’ has taken place to a party and to engage in a dialogue with authorities in a Police Station in order to solve a dispute. Clause 7(b) thereby empowers such officers of the Corporation to pre-judge the nature of a dispute by enabling them to determine that ‘*an injustice has taken place*’. What is ‘injustice’ to the officers of the Corporation may not be “injustice” to others. This Clause is also not clear whether ‘injustice’ is referable to police injustice or injustice committed by one disputant party against the other party. A determination on injustice can be made only through a judicial process and therefore infringes on the judicial power of the People. Furthermore, the power to ‘*engage in a dialogue*’ is vague and exceeds the limits on making a representation. Hence granting such a right leads to arbitrariness and therefore is violative of Article 12(1) of the Constitution.

We are therefore of the view that the effect of Clause 7, taken as a whole, is violative of the provisions of Articles 3, 4 and 12(1) of the Constitution.

#### Clause 4 and Clause 6

Clause 4 of the Bill stipulates that, “*The management, control and administration of the Corporation shall, subject to the provision of this Act and the rules in force for the time being of the Corporation, vest in a Board of Directors...*”. (emphasis added) Furthermore, Clause 6 (4) of the Bill provides that “*The rules of the organization in force on the day preceding to date of commencement of this Act...be deemed to be rules of the Corporation made under this section*”. Clause 9 of the Bill contain similar provisions that seek to confer force of law to a set of existing rules, which do not form part of the Bill and therefore is not before the Parliament.

It is also pertinent to note that in terms of Clause 6(2), the amending, altering, adding or rescinding the existing rules may be made from time to time at any general meeting of the Corporation, without any requirement to place such rules before Parliament. If the Parliament enacts this Bill, it will be granting recognition to a set of existing rules the content of which is unknown as well as to any such future amendments. This Court, in “*New Wine Harvest Ministries (Incorporation) Bill*” S.C.S.D. No. 2/2003 determined that Parliament cannot give the force of law to any rules that have not been placed before it and that to do so would amount to an abdication of the legislative power of the People and be violative of Article 76(1) of the

Constitution. We are therefore of the view that Clause 6 is inconsistent with Article 76(1) of the Constitution.

#### Clause 14

Clause 14 reads as follows:

*“Nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporate or of any other person, except such as are mentioned in this Act and those claiming by, from or under them.”*

The Supreme Court in **“Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill”** S.C.S.D. No. 2/2001 examined the identical provision under consideration and determined that such provision, *“would lead to the inference being drawn that the right of the Republic and other corporations and persons are superseded by the provisions of the Act”*. However, it was further observed that if the said clause is amended to read *“Nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporation”* the inconsistency would cease.

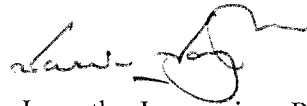
The Bill under consideration seeks to incorporate an existing organization and give it legal persona. It further seeks to clothe the organization with statutory powers without any provision to supervise and monitor the exercise of such powers. It is different from the incorporation of a Public Corporation for instance which will be granted specific statutory powers with the required checks and balances. This Bill, as such requires careful scrutiny, as the Bill, if passed in its present form, would confer upon the incorporated body untrammelled and unrestricted power. The absence of any mechanism to regulate the activities of the incorporated body would lead to arbitrariness in the performance of their functions.

It is observed that the body sought to be incorporated has been termed “The Human Rights Organization”, and it is pertinent to note that there is a Human Rights Commission already in place whose members are appointed by the President with the observations of the Parliamentary Council. In setting out the general objects of the Corporation, Clause 3(a) states *“to protect and make known human rights, humanities and fundamental rights.”* We are of the view that this Bill needs to be considered as a whole in the context of Clauses 3,4,6 and 7 which deals with “General objects of the Corporation”, “Management of the Corporation”, “Rules of the Corporation” and “Rights to engage in dialog[ue] with concern[ed] parties with a view to solve the dispute”. In view of our findings on Clauses 4, 6 and 7 enumerated hereinbefore, we do not

think it is necessary for the present purposes to consider each and every Clause in determining the constitutionality of the Bill.

As we have already held that Clause 6 of the Bill is inconsistent with Article 76(1) of the Constitution and Clause 7 of the Bill is inconsistent with Articles 3, 4 and 12(1) of the Constitution, we make determination in terms of Article 123(2) of the Constitution that the Bill is required to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83 of the Constitution.

We place on record our deep appreciation of the assistance given by the learned Senior State Counsel and the learned Counsel for the Petitioners.



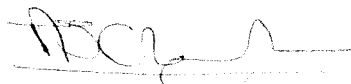
Jayantha Jayasuriya, P.C.

Chief Justice



Mahinda Samayawardhena

Judge of the Supreme Court



Arjuna Obeyesekere

Judge of the Supreme Court